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BULLOCK & COFFMAN, LLP
ATTORNEYS AT LAW

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ROBERT V. BULLOCK‡
PRESTON S. CECIL‡‡
CHRISTOPHER M. OLDS
JOSIAN PASSALACQUA†

PUBLIC SERVICE
COMMISSION
THOMAS D. BULLOCK
J. ERIC COFFMAN
W. BRADLEY HAWKINS
M. SCOTT MATTMILLER††
HAROLD L. KIRTLEY II

KERRY T. CAUTHEN
Of Counsel

FRANKFORT OFFICE
101 ST. CLAIR STREET
FRANKFORT, KENTUCKY 40601
(502) 226-6500 TELEPHONE
(800) 611-7779 TOLL FREE
(502) 226-1101 FACSIMILE

LEXINGTON OFFICE
234 N. LIMESTONE STREET
LEXINGTON, KENTUCKY 40507
(859) 225-3939 TELEPHONE
(859) 225-5748 FACSIMILE

‡ Licensed in Ohio
‡‡ Licensed in Maryland and West Virginia
† Licensed in Texas
†† Licensed in California

September 1, 2006

Via Hand Delivery

Beth O'Donnell, Exec. Director
Public Service Commission
211 Sower Blvd.
Frankfort, Kentucky 40602

RE: Case No. 2005-00389

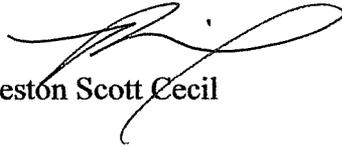
Dear Ms. O'Donnell:

Please be advised that our firm has been retained to represent 271 West Main Street, LLC, in the above-referenced matter. Per the Commission's Order, please find included with this letter the requisite number of copies of our client's memorandum in this case.

Please let this correspondence serve as notice that we are requesting an evidentiary hearing in this case at the Commission's convenience. After review of these matters, do not hesitate to call with any questions you may have. I look forward to hearing from you soon.

Very Truly Yours,

BULLOCK & COFFMAN, LLP


Preston Scott Cecil

cc/ Andre Regard

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION
CASE NO. 2005-00389

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PUBLIC SERVICE
COMMISSION

In the Matter of:

271 WEST MAIN STREET, LLC

COMPLAINANT

V.

KENTUCKY UTILITY COMPANY

DEFENDANT

271 WEST MAIN STREET, LLC'S MEMORANDUM
IN RESPONSE TO COMMISSION'S ORDER OF JULY 21, 2006

* * * * *

INTRODUCTION

This is an action in which the Complainant, 271 West Main Street, LLC (hereafter, "West Main") purchased an established and existing property currently being serviced by Kentucky Utility Company (hereafter, "KU" or "Defendant") located at 269 West Main Street, Lexington, Kentucky (hereafter, the "Property"). Subsequent to purchasing the Property, West Main's electric bills immediately went up approximately forty-three (43%) percent. After attempting to resolve this issue with the Defendant, West Main filed this Complaint with the Kentucky Public Service Commission (hereafter, the "Commission"). West Main hereby submits its Memorandum pursuant to the order of the Commission dated July 21, 2006, as amended. For the reasons set forth below, West Main's cost for power consumption is governed by the LP Electric Rate Schedule for Large Power Service (hereafter, "LP Tariff") which was in effect when it purchased the Property.

FACTUAL BACKGROUND

West Main purchased the Property, also known as the Court Square Building, on March 18, 2005. The Court Square Building is a commercial office building made up of ten (10) floors.

These ten floors have various commercial tenants that were occupying these spaces prior to, during and after the purchase of the Property by West Main. These tenants are the actual users of the power provided by the Defendant. Also, it should be noted that West Main owned the building adjacent to the Property at its time of purchase.

Prior to purchasing the Property, West Main examined the history of the expense for electricity on the Property by reviewing the prior billing information from the Defendant. In those utility bills, the rate type was LP-secondary and the cost per kwh was about 4.25 cents per kwh. After the acquisition of the Property by West Main, the rate increased to about 6.1 cents per kwh. This is an approximately forty-three (43%) percent increase for the same users currently occupying the same space in the Property.

West Main contacted the Defendant as soon as it discovered this billing discrepancy and requested an explanation for the rate increase. See Letter dated June 8, 2005, attached hereto as **Exhibit "A"**, and incorporated herein by reference. The Defendant finally contacted West Main by letter on June 17, 2005. This letter provided that the Property was subject to the General Service (GS) rate instead of the LP rated discussed above. Interestingly, the reason for the increase given in this letter was that, "[the] accounts already on the LP rate as of July 1, 2004 were allowed to stay on the same rate." The letter goes on to say that this was a new account and therefore ineligible for the LG rate. As the Defendant has admitted in its Memorandum, the applicability of the rates is tied to the "customer", not the "account". See copy of Letter to West Main dated June 17, 2005 attached hereto as **Exhibit "B"**, and incorporated herein by reference. Since the parties could not reach an agreement on the appropriate rate to be charged, West Main filed its Complaint in this action on September 21, 2005. In that Complaint, it alleged that the

rate in effect at the time of the purchase should apply since the Defendant was currently providing electricity to the Property and the end-users were the same.

ARGUMENT

The issue before the Commission is how the term “customer” is defined for the purpose of determining the applicable Tariff for the rate charged for electric service. To the Complainant’s knowledge, this is an issue of first impression in Kentucky. The Defendant has suggested in its Memorandum that the Tariff Provision at issue is clear and unambiguous. However, in the same section that it makes this claim, it admits that the term “customer” is not defined for the purposes of determining the applicable Tariff.

I. The Regulations in Kentucky Governing Tariff Rates Clearly Contemplate the Property and not the Property Owner as the Customer.

The clause relied upon by West Main for the contention that the LP Tariff should apply to the Property is as follows:

Customers with average single phase loads less than 200 KW receiving service under this rate schedule as of July 1, 2004, will continue to be served under this rate schedule.¹

The Defendant argues that the term “customer” means the owner of the location upon which the electricity is being used by citing several sections of the KAR that do not apply to Tariffs or Tariff rates. However, a closer look at the sections of the KAR dealing with Tariff rates and rate adjustments provide insight into the intention of the Commission to treat the property as the “customer”. The most telling of these provisions is found at 807 KAR 5:001 Rules of Procedure. This section covers, among other things, applications for adjustments in existing rates. Section 10 provides the requirements for said applications:

Section 10. Applications for General Adjustments in Existing Rates

(3) Form of notice to customers. Every utility filing an application pursuant to this section shall notify all affected customers in the manner prescribed herein. The notice shall include the following information:

(a) The amount of the change requested in both dollar amounts and percentage change for each **customer classification** to which the proposed rate change will apply;

(b) The present rates and the proposed rates for each **customer class** to which the proposed rates would apply;

(c) Electric, gas, water and sewer utilities shall include the effect upon the average bill for each **customer class** to which the proposed rate change will apply; (Emphasis Added).

This section clearly contemplates rates for each “customer class” for which a certain amount of electric service is required. As seen in the section of the LP Tariff quoted above, Tariff amounts are determined by the amount of power used at a specific property. The Tariff amount is determined by the amount of power used at a particular location; thus determining its “customer class”.

Inserting the owner of a service location in this context as the Defendants suggest simply doesn’t work. For instance, a property owner could have many properties each with a different average phase load. It would then be impossible to use such a property owner as the customer to determine a “customer class” for the purpose of a rate increase as set forth in 807 KAR 5:001. 2 Thus it is clear that the regulations governing adjustments in Tariff rates define “customer” as the service location and not the property owner.

II. “Grandfather Clauses” are Traditionally Applied to the Service Location and not the Customer in the Utility Rate Context.

The Defendants in their Memorandum correctly define a “grandfather clause” in the

1 Kentucky Utilities Company LP Electric Rate Schedule for Large Power Service, Original Sheet No. 20, PSC No. 13, Issued July 20, 2004.

2 See also, 807 KAR 5:076. **Alternative rate adjustment procedure for small utilities.** This section also uses the “customer class” scheme for determining rates and rate adjustments.

utility context as, “a tariff change which freezes the availability of a rate to existing customers or deliveries and requiring new customers or deliveries under that tariff to take the same type of service under a different rate”. Once again, whether a party is the beneficiary of this type of “grandfather clause” is determined by whether they fall within the definition of an “existing customer”.

Unfortunately, Kentucky jurisprudence provides little guidance in this area. However, several other states have encountered this issue in the oil and gas arena. For instance, in *Brennan Petroleum Products Co. v. Pasco Petroleum Co.*, 373 F. Supp. 1312 (D. Ariz. 1974) a Plaintiff retailer brought a motion for a preliminary injunction, seeking to require defendants, supplier and officers, to allocate a certain supply of gasoline to the retailer each month. Defendants brought a motion to quash a temporary restraining order and order to show cause issued upon the filing of the retailer's complaint.

The retailer alleged that defendants' allocation of gasoline to the retailer violated the Sherman, Clayton, and Emergency Petroleum Allocation Acts. The retailer argued that gasoline stations acquired by defendants from a customer were not new market entries and treating them as such violated the Emergency Petroleum Allocation Act and its regulations. The court granted the retailer's motion for a preliminary injunction requiring defendants to provide it with the same pro rata share of gasoline received in the previous year. The court enjoined defendants from treating 1972 purchasers as new customers and from adjusting the base period volume of its own retail operation.

In its opinion the *Pasco* court stated:

"Changes in ownership of a supplier or wholesale purchaser shall not alter supplier/purchaser relationships defined by specific dates or base periods" Id. §

211.24(a). The conclusion from the cited authority is inescapable: The six stations Pasco acquired from Shepherd Bros. and U-Pump, which it had supplied during the base period, are not new customers but old. They are changed-ownership stations with an historical supplier -- Pasco itself. *Brennan Petroleum Products Co. v. Pasco Petroleum Co.*, 373 F. Supp. 1312, 1318 (D. Ariz. 1974)

This case, like *Pasco*, involves a provider who is arguing that it should be allowed to raise its rates on its existing customers simply because the property has changed ownership. The reasoning in the *Pasco* case is also sound and relevant in refuting this assertion. Namely, even though the building has changed ownership, the utility rates should stay the same because there is a historical supplier- Kentucky Utilities. A further factor not present in *Pasco* that weighs against applying higher rates is the fact that the tenants in the Property were there prior to the purchase of this building by the Complainant. This fact makes the application of the extremely higher rates to these long-term occupants even more unfair and inequitable.

Case law is not the only resource that sheds light on how the term new or existing customer has been defined in the utility context. For instance, in the State of Washington, “New customers are defined as electric service locations not already in existence as of the date that electric utility facilities subject to the provisions of this subsection are planned and constructed.” Rev. Code Wash. (ARCW) § 58.17.040.

Also, South Dakota defines a “new customer” for the purposes of establishing assigned service areas as customers at new locations:

§49-34A-56.

Notwithstanding the establishment of assigned service areas for electric utilities provided for in §§ 49-34A-43 and 49-34A-44, new customers **at new locations** which develop after March 21, 1975, located outside municipalities as the boundaries thereof existed on March 21, 1975, and who require electric service with a contracted minimum demand of two thousand kilowatts or more shall not be obligated to take

electric service from the electric utility having the assigned service area where the customer is located ... S.D. Codified Laws § 49-34A-56 (Emphasis Added).

The Defendant attempts to argue that this interpretation of “customer” for purposes of applying the grandfather clause would, “have the effect of creating a rate class with rights in perpetuity, to the detriment of other customers”. Defendant’s brief, page 5. The Defendant further argues that such an outcome would be unfair to customers constructing new structures as opposed to existing ones.

First, it must be noted that the Defendant, through the tariff, created the grandfather clause and its effect upon its customers, both new and existing. It is axiomatic that such language should be construed against the drafter. See *Boyd v. Phillips Petroleum Company*, Ky., 418 S.W.2d 736, 738 (1966) and *Pulliam v. Wiggins*, 580 S.W.2d 228, 230 (Ky. Ct. App. 1978). Also, as noted above, the Complainant conducted a diligent inspection of the utility costs of the Property prior to purchase. Such a search could not and did not reveal the possibility of a drastic increase under the existing tariff. In other words, there was no notice to the Complainant of the possibility of such an increase. The flip side of the Defendant’s argument should also be considered. Namely, under the Defendant’s definition of customer, a current property owner who merely restructures and forms a new entity to own a piece of property already serviced by the Defendant would be subject to drastically increased utility costs. This inequitable result would follow even though, as here, the end-users of the Defendant’s commodity are the same.

Secondly, in the case *sub judice*, not only the users but also the use of the Property remained the same before and after the proposed rate hike by the Defendant. The Property was, and still is, a commercial building used for office space of various types. Harkening back to

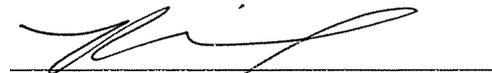
grandfather clauses in the zoning context, the focus on maintaining such a use is on the continuation of the non-conforming use after new regulations are passed. The rationale for upholding grandfather clauses is that, “when an initial regulatory scheme is adopted, existing businesses must sometimes be preserved in order to satisfy the dictates of fairness and avoid hardships”. *United States v. Maher*, 307 U.S. 148, 153, 59 S. Ct. 768, 83 L. Ed. 1162, 1167 (1939); *Commonwealth Air Transport v. Stuart*, 303 Ky. 69, 196 S.W. 2d 866 (1946); *Affiliated Distillers Brands Corp. v. Sills*, 56 N.J. 251, 262 (N.J. 1970). That rationale applies squarely to this case in that the tenants and use of the Property remain the same as before the proposed rate hike. Therefore, an application of such an arbitrary and unwarranted increase to these users expose them to undue hardship far outweighing any negative consequence to the Defendant.

Finally, unlike the zoning arena where grandfathered uses can continue in perpetuity, the Defendant can apply for a new tariff with the Commission and raise the rates of its existing customers. See 807 KAR 5:001 *et seq.* This would alleviate any possibility of unfairness to the Defendant due to its ability to raise these rates in the future while adding the safeguards of the application and approval process for new tariffs. Such a process will eliminate the inequitable result of a drastic increase in utility cost suffered by the Complainant in this case.

CONCLUSION

For the reasons set forth above, the Complainant’s power consumption is governed by the LP Electric Rate Schedule for Large Power Service (hereafter, “LP Tariff”) which was in effect when it purchased the Property.

Respectfully Submitted,



PRESTON CECIL
ROBERT BULLOCK
BULLOCK & COFFMAN
101 St. Clair Street
Frankfort, KY 40601
(502) 226-6500
Counsel for Complainant

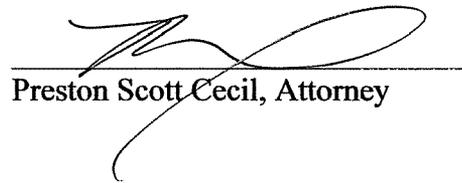
CERTIFICATION

I certify that I have sent, first class mail, postage prepaid, a copy of the foregoing on the 1 day of September to the following:

J. Gregory Cornett
STOLL, KEENON OGDEN, PLLC
2000 PNC Plaza
500 W. Jefferson Street
Louisville, Kentucky 40202

Elizabeth L. Cocanougher
Senior Corporate Attorney
E. ON U.S. LLC
220 West Main Street
Louisville, Kentucky 40202

Allyson K. Sturgeon
Attorney for E. ON US. LLC
220 West Main Street
Louisville, Kentucky 40202
Counsel for Kentucky Utilities Company



Preston Scott Cecil, Attorney

271 W. Main St. LLC

320A. Pleasant St., Paris, Ky 40361
(859) ~~987-2820~~ Fax (859) 987-3581

~~281~~-13/8
June 8, 2005

Kentucky Utilities
P.O. Box 14242
Lexington, KY 40512-4242

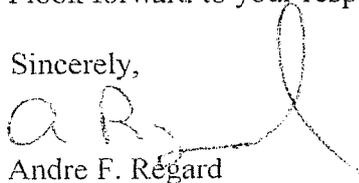
Dear Kentucky Utilities,

I am the Managing Partner of 271 West Main Street, LLC, which recently purchased the Courtyard Square building at 269 West Main Street, Lexington, Ky.

Prior to purchasing the building, we went through the various KU electrical bills related to the building. In those utility bills, the rate type was LP-secondary and on average the cost per kwh was around 4.25 cents per kwh. After our acquisition of the building, we received an electrical bill from KU, which was dated May 16, 2005. On this bill the rate type was changed to GS (General Service) and the charge per kwh was increased to 6.1 cents. This reflected a 43% increase in utility charges related to this building. I called KU immediately and spoke to a woman in billing who was supposed to send me a written explanation for the difference. I have not received this explanation from KU.

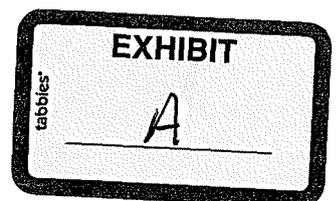
This increase is unacceptable based on the prior billings related to this building. I have paid the charges in order to continue service, but would like a review of the account and a meeting to discuss this issue further. I look forward to your response.

Sincerely,



Andre F. Regard

AFR/bm



Utilities



June 17, 2005

Andre F. Regard
320A Pleasant Street
Paris, KY 40361

Dear Mr. Regard:

This is in response to your letter dated June 8, 2005, regarding billing information for Kentucky Utilities Account # 163825-023 in the name of 271 W. Main St. LLC.

I want to apologize that you have not received the billing explanation information requested. It appears that the information was sent to the billing address in Lexington.

We understand your concern about the rate change and subsequent increase in per KWH costs for the above listed account. The reason the account is now on the General Service (GS) rate instead of the Light and Power (LP) rate is due to our rate adjustments that went into effect July 1, 2004. With the new rates, commercial accounts must average at least 200 KW per month to be eligible for the LP rate. However, accounts already on the LP rate as of July 1, 2004 were allowed to stay on the same rate. With this account being activated March 30, 2005, and is only averaging 151 KW per month for the first two months, it is not eligible for the LP rate and was placed on the GS rate.

I have enclosed a copy of the GS and LP rate tariffs for you review. If we can be of further assistance or if you would like to meet with a Business Specialist please contact the KU Business Service Center at 859-367-1200 or 800-383-5582.

Sincerely,

A handwritten signature in cursive script that reads 'David A. Daniel'.

David A. Daniel
Manager, Business Service Center

